SABAH SHIPYARD SDN BHD & ANOR *a*

v.

PUBLIC LEASING & FACTORING SDN BHD & ORS (NO 1)

HIGH COURT MALAYA, KUALA LUMPUR *b*
ABDUL AZIZ MOHAMAD J
[ORIGINATING SUMMONS NO: D2-24-23-1998]
18 AUGUST 1999

CONTRACT: *Construction of terms - Agreement to grant credit facilities for hiring of turbine - Repossession upon default - Whether agreement a hire-purchase agreement - Whether a loan agreement - Whether applicant owner of turbine - Whether entitled to repossession* *c*

CONTRACT: *Construction of terms - Agreement to grant credit facilities for hiring of turbine - Lessor advancing money for hirer upon security of a turbine - Legality - Whether a bill of sale - Whether void for non-registration - Bills of Sale Act 1950, ss. 3, 4(1), 4(1)(a)* *d*

Sabah Shipyard Sdn Bhd ('Saship') had purchased one unit of combustion turbine ('the turbine') from Wing Tiek Holdings Berhad ('Wing Tiek') for RM49 million. It was common knowledge that the turbine was to be affixed to Victoria II, a *e* power barge which Saship had contracted to construct and sell to a third party. The purchase was a credit purchase as Saship only paid Wing Tiek RM29 million. Be that as it may, on 3 August 1996, Saship entered into an agreement ('the Agreement') with the third intervenors ('BSNC'), and by that, took the turbine on hire-purchase from BSNC for RM22,222,944 payable in 24 equal instalments. *f* Following the Agreement, BSNC advanced to Wing Tiek RM20 million.

Saship defaulted in the payments under the Agreement and BSNC applied for an order to repossess the turbine. Saship and the second applicant, in the meanwhile, had obtained an order under s. 176(10) of the Companies Act 1965 restraining *g* their creditors from instituting or continuing with proceedings against them ('the restraining order'). In the circumstances Saship argued that BSNC was restrained from pursuing with the application for repossession. It was also argued that the Agreement was not a hire-purchase transaction but a loan agreement for RM20 million, and that being so the remedy of repossession was not available to BSNC. Meanwhile, an unsecured creditor of Saship ('Usaha Asas') applied for leave to *h* intervene in BSNC's application for the purpose of obtaining a declaration that the Agreement was void and unlawful. In the circumstances, a question also arose as to whether Usaha Asas had the *locus standi* to intervene, and if so whether the Agreement was void for contravening *inter alia* the Bills of Sale Act 1950.

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Held:

[1] Usaha Asas had a financial interest in the matter as, if BSNC succeeded in their application and obtained repossession of the turbine the interest of Saship's unsecured creditors would be adversely affected, in that it would reduce the benefit that unsecured creditors might hope to obtain from the proposed scheme under s. 176(10) of the Companies Act 1965. Usaha Asas had the *locus standi* to intervene and ought to be allowed to do so.

[2] There were various indications in the Agreement that went to support the view that the transaction between Saship and BSNC was a loan transaction. That view was strengthened by the consideration that since the turbine was to form a part of the power-barge that Saship were under a contract to construct and sell to a third party, BSNC and Saship would have known that a true hire-purchase arrangement, with the essential feature that BSNC were the owner of the turbine with the right to repossession upon default, would not have been possible.

[3] BSNC could not succeed in their contention that the Agreement was a true hire-purchase agreement unless they could show that at some distinct point in time before the execution of the agreement, they had become the owner of the turbine. This BSNC failed to do. It was thus clear that the transaction between BSNC and Saship was a lending of RM20 million, with the turbine as security, but cloaked in a hire-purchase agreement. This being the case, Saship, and not BSNC, were the owner of the turbine.

[4] The Agreement being a loan agreement, it fell within the definition of "bill of sale" in s. 3 of the Bills of Sale Act 1950 ('the Act'). The Agreement fell within the definition because BSNC, the lessor, had advanced moneys to Saship, the hirer, and the purpose of the Agreement was to provide security for the repayment of the money by the device of a seeming hiring of the turbine by BSNC to Saship. The Agreement was a bill of sale, and not being registered under s. 4(1) of the Bills of Sale Act 1950 it was void in respect of the turbine.

[Application for repossession dismissed; prayers for declarations by Usaha Asas granted.]

Legislation referred to:
Bills of Sale Act 1950, ss. 3, 4(1)
Companies Act 1965, ss. 108, 176

For the applicants - William Leong (Jayanthi Pillay & Lee Kuan Leong with him); M/s Kadir, Tan & Ramli
For the 3rd intervenors - N Chandran (S Ramesh with him); M/s Adnan Sundra & Low
For the 5th intervenors - Liza Chan; M/s Liza Chan & Co

Reported by WA Sharif

JUDGMENT

Abdul Aziz Mohamad J:

On 4 February 1998, when, on the *ex parte* application of the applicants ("Saship" and "Westmont"), making orders under s. 176 of the Companies Act 1965 for the summoning of meetings of their creditors to consider schemes of arrangement proposed by the two companies, I also made a restraining order pursuant to sub-s. (10) in favour of the two companies.

On 21 December 1998, in view of the restraining order, the third intervenors ("BSNC") filed an application (encl. (101)) in which one of the orders they sought was an order granting them liberty to take possession of a turbine, which was affixed to a power-barge named Victoria II. They claimed that the turbine was their property which they had let to Saship under an agreement dated 3 August 1996, which they claimed to be a hire-purchase agreement ("the Agreement"), that Saship had defaulted under the agreement and that, therefore, they were entitled under the agreement to take possession of the turbine. It was not disputed that Saship had defaulted under the agreement, under which Saship were to pay BSNC an amount of RM22,222,944 in 24 equal monthly instalments commencing on 30 November 1996, and that, as at 16 December 1996, the amount owing by Saship, including overdue interest, was RM26,353,688.93.

Saship opposed the application principally on the ground that they were the owner of the turbine, that the agreement was in reality a cloak for a loan transaction and that therefore BSNC were not entitled to repossession of the turbine but only to repayment of the loan.

On 25 January 1999 the fifth intervenors ("Usaha Asas"), filed an application for leave to intervene in BSNC's application in order to obtain a declaration that the agreement was void, unlawful and contrary to public policy. For their *locus standi* to intervene, they claimed that they had a financial interest in the matter as they were an unsecured creditor of Saship who would have a share in the proposed scheme of arrangement and that if BSNC succeeded in their application and obtained repossession of the turbine the interests of Saship's unsecured creditors would be adversely affected. That was because the income from the sale of the power-barge Victoria II, in which the turbine had been installed, was necessary for the success of the scheme and if the turbine was repossessed by BSNC the power-barge would lose its value or the sale might be frustrated. It would reduce the benefit that unsecured creditors might hope to obtain from the proposed scheme.

Apart from BSNC having consented to Usaha Asas's intervention, I was of the clear view that Usaha Asas had the *locus standi*.

Usaha Asas contended that the agreement was actually a loan agreement. On that basis, they relied on two grounds for saying that it was void. Firstly, it fell within the third definition of "bill of sale" in s. 3 of the Bills of Sale Act 1950, being an agreement "for the hire of personal chattels entered into for the purpose of securing the repayment to the lessor of such chattels of money advanced by him to the hirer." As I understood the point, the agreement fell within the definition because BSNC, the lessor, had advanced moneys to Saship, the hirer, and the purpose of the agreement was to provide security for the repayment of the money by the device of a seeming hiring of the turbine by BSNC to Saship. The agreement was therefore a bill of sale and, not being registered as required by s. 4(1) of the Bills of Sale Act 1950, was, according to s. 4(1)(a), void in respect of the turbine.

Taking the matter further, Usaha Asas contended that the agreement, as a loan agreement, created a charge of the turbine, and because the agreement would be invalid if not registered under the Bills of Sale Act 1950, the charge was a charge to which s. 108 of the Companies Act 1965 applied by virtue of sub-s. (3)(d). Since there had been no lodgment with the Registrar of Companies of the prescribed particulars in relation to the charge, as required by sub-s. (1), Usaha Asas contended that the charge, so far as it conferred any security on the turbine, was void against the creditors of Saship. The consequence was that, Saship being the owner of the turbine, not only would BSNC not be able to claim repossession of it, but they would also not be able, as against the creditors of Saship, to claim interest in it as a security for the loan, and the unsecured creditors would then be able to share in the benefit to be derived from the sale of the power-barge, intact with the turbine positioned in it.

Usaha Asas's other ground for contending that the agreement was void was that, it being an agreement for a loan, it was in contravention of the Moneylenders Act 1951 because BSNC were not a licensed moneylender.

BSNC did not dispute, or did not make a serious attempt to dispute, that those would be the consequences in law – as I too was to find – if the agreement was a cloak for a loan transaction. There was an attempt by BSNC, during submission on Usaha Asas's *locus standi*, to question the consequence under s. 108 of the Companies Act 1965, but it was merely a feeble attempt. In any event, the consequence under s. 108 could not, I thought be the appropriate basis for the declaration sought by BSNC, which was a declaration to nullify the agreement, because the effect of s. 108 is not to nullify the instrument creating the charge, but only to render the charge void against creditors so far as it confers any security on a company's property.

The rest – which was the major portion – of the submission on the two applications was directed to the question whether the agreement was a cloak for a loan transaction, which was really the controversial question. For the determination of the question, certain events leading to the signing of the agreement, and certain documents related to those events, were alluded to in submission, which I shall now set forth.

The turbine was intended to be installed in, and become an important component of, a power-barge, named Victoria II, which Saship were constructing for the purpose of selling it to a Japanese company, Marubeni Corporation ("Marubeni"). The sale and purchase agreement was signed on 9 January 1995. The price was USD55 million. The barge was to be delivered by 9 September 1995.

Saship, according to them, purchased the turbine from Wing Tiek Holdings Bhd. ("Wing Tiek") for RM49 million, who in turn had purchased the turbine from Westinghouse Electric Company ("WEC"), a company in the United States of America. The turbine was loaded on board ship at Houston, Texas, on 24 June 1995, to be discharged at Labuan. The bill of lading of that date stated that the consignee was Oriental Bank Berhad and that the parties to be notified were Wing Tiek and Saship. BSNC were not mentioned. The turbine arrived in due course at Labuan, and on 15 September 1995 it received customs clearance there. The customs declaration said that the consignee was Saship. The turbine then came into the possession of Saship. According to Saship, it was on Wing Tiek's instructions that WEC consigned the turbine direct to Saship.

Wing Tiek issued the invoice for the turbine only on 3 January 1996. To go by the ACCOUNTS copy of the invoice that was kept by Wing Tiek, the invoice was addressed to Saship. The amount invoiced for was RM49 million.

Saship paid Wing Tiek RM29 million of the RM49 million, leaving RM20 million owing to Wing Tiek. Assuming that BSNC had not yet come into the picture, the position at that stage had to be one between Wing Tiek and Saship only, with Saship having ownership and possession of the goods but owing Wing Tiek RM20 million. It looked like a sale on credit by Wing Tiek to Saship. (I said "assuming" because there was a piece of evidence, to which I shall refer later, which BSNC relied on for arguing that they had already come into the picture when the invoice was issued but which, for the reasons that I shall state later, I did not accept as proving so).

BSNC first came into the picture nine months after Saship received the turbine. On 15 June 1996 they wrote to Saship to say they had approved to Saship "A Combine Industrial Hire Purchase and Leasing Credit Line Facilities to a limit not exceeding RM20,000,000 in amount financed, to be drawndown in various Industrial Hire Purchase and Equipment Lease agreements". It was an approval

in general terms, not yet specifically related to the turbine. One of the predisbursement conditions – para. 15(e) – was the receipt by BSNC of original invoices addressed to them. It is to be noted that the idea of credit and financing was combined with the idea of hire-purchase and leasing.

On 19 July 1996 BSNC wrote to Wing Tiek to ask for certain documents required for the purpose of "drawdown". One document that Wing Tiek required was proof of payment of the RM29 million. Another document that they required was "A copy of Contract between (Saship) and their customer for the construction of the barge". That letter constituted proof that BSNC knew that the turbine was for the power-barge that was being constructed for sale to another party and that, therefore, the turbine would pass to the buyer together with the power-barge.

As regards the word "drawdown" that was used in that letter, the *Concise Oxford Dictionary* gives its meaning as "an act of raising money through loans; borrowing".

I also have to mention that in item 4 of that letter, BSNC said that they were "financing" the turbine. The *Concise Oxford Dictionary* gives the meaning of the verb "finance" as "to provide capital for".

On 29 July 1996, BSNC wrote to Saship with reference to their earlier letter of 15 June 1996 to say that they had approved certain additional terms and conditions. The effect of terms (1), (2), (3) in the letter was that BSNC would provide capital for the turbine in the sum RM20 million, being 40.82% of the invoice amount of RM49 million.

Next day, on 30 July 1996, an agreement was entered into whereby Ganda Energy & Holdings Inc. ("Ganda"), a Filipino company, took over from Marubeni the purchase of the power-barge Victoria II.

Two days later, on 1 August 1996, Saship's board of directors accepted the facility offered by BSNC. The resolution described the agreement to be entered into by Saship and BSNC as a "Loan Agreement", which indicated that to the directors the reality of the transaction was that it was a loan transaction. I did not think that the use of the term "Loan Agreement" was an instance of loose drafting. Apart from anything else, the use by BSNC in their letters of the terms "credit line", "drawdown", and "financing" would justify Saship's directors' regarding the facility as a loan facility.

On 3 August 1996 the agreement was entered into. It took the form of a hire-purchase agreement wherein BSNC were described as the owner of the turbine and Saship were described as the hirer. Taking the form of a hire-purchase agreement, the agreement naturally contained clauses that befitted a hire-purchase agreement. But it also contained clauses and terms that were not consistent with

existing realities. There was cl. 3.9, by which Saship were not to part with possession of the turbine; but possession of the turbine, with BSNC's knowledge, was meant to be parted with, with the sale of the power-barge of which it was to form a part. There was cl. 9.1(i), by which Saship were not to do anything that might prejudice BSNC's right to ownership; but BSNC knew that Saship needed the turbine to do the very thing that the clause said they were not supposed to do, that is to complete the power-barge for sale together with the turbine in it.

Then there was the question of the option to purchase. Clause 12.1 gave Saship the option to purchase the turbine after paying all sums of money payable to BSNC under the agreement. In consideration of the option, cl. 2.1 required Saship to pay to BSNC, upon signing of the agreement, the deposit specified in Part III of the Schedule to the agreement. But Part III did not provide for any deposit. So there was no consideration for the option to purchase, and that fact was consistent with the position that Saship, not BSNC, were the owner of the turbine, so that there was no necessity for any option to purchase.

As regards Part III of the Schedule to the agreement, it appeared to be the kind of statement one gets from a motor dealer when buying a motor-vehicle with a loan from a financial institution. It began by giving the cash price of the turbine as RM20 million. To that were to be added amounts for insurance, road tax, and registration fee, which were of course nil, so that the total cash price remained at RM20 million. From that, there was to be deducted the deposit mentioned earlier, which was nil, and which, in a motor-vehicle transaction, would be the difference – which the purchaser has to pay the dealer – between the cash price and the amount to be financed by the financial institution. Then came the "Amount to be financed" – note the word "financed" again – which of course remained at RM20 million. In a motor-vehicle transaction, the amount to be financed would be the amount that the purchaser will borrow from the financial institution, which will not be the owner of the vehicle but to whom it will be "charged" as security for the loan.

The statement in Part III of the Schedule that the cash price of the goods was RM20 million implied a representation that BSNC, at the date of the agreement, 3 August 1996, were the owner of the turbine, having bought it for RM20 million. It raised the crucial question of when did BSNC become the owner of the turbine, or when and from whom did they purchase it for RM20 million. Learned counsel for BSNC did not suggest that BSNC bought it from Saship for RM20 million. At one point he submitted that BSNC bought it from Wing Tiek, but Wing Tiek could not have sold it to BSNC because Wing Tiek had already sold it to Saship and received RM29 million from Saship as part of the purchase price. Later on in his submission, learned counsel for BSNC suggested that BSNC became the owner of the turbine at the date of the agreement. It implied that the signing of the agreement effected two things simultaneously, namely, a sale by Saship of

the turbine to BSNC and a hiring of the turbine back to Saship. But the agreement was only about hiring, with BSNC claiming that they were already the owner. There was no proof that Saship had sold the turbine to BSNC at any time before the agreement. In any event they could not have sold it to BSNC because it was already subject to a sale to Ganda as part of the power-barge Victoria II.

As I have attempted to show, there were various indications in the documents that I have mentioned that went to support the view that the transaction between Saship and BSNC was a loan transaction. That view was strengthened by the consideration that since the turbine was to form a part of the power-barge that Saship were under contract to construct and sell to a third party, a fact that was known to BSNC, BSNC and Saship would have known that a true hire-purchase arrangement, with the essential feature that BSNC were the owner of the turbine with the right to repossession upon default, would not have been possible. The ultimate determinant was the failure on BSNC's part to show, against the history of events that I have set out, at what stage and in what manner they became the owner of the turbine. BSNC could not succeed in their contention that the agreement was a true hire-purchase agreement unless they could show that at some distinct point in time before the execution of the agreement they had become the owner of the turbine. This they had not been able to do. It was therefore clear to me that the transaction between BSNC and Saship was a lending of RM20 million, with the turbine as security, but cloaked in a hire-purchase agreement.

I come now to the evidence that I mentioned earlier that BSNC relied on as proof that they had already come into the picture when Wing Tiek's invoice dated 3 January 1996 was issued. I have already referred to the ACCOUNTS copy kept by Wing Tiek. Among the documents exhibited by Saship in their first affidavit in reply to BSNC's application was a copy of the ORIGINAL copy of the invoice issued by Wing Tiek. The ORIGINAL copy, when originally made, would have been identical with the ACCOUNTS copy, but it was subsequently altered by the deletion of Saship as the party to whom the invoice was addressed and the substitution of BSNC instead. The alteration bore a round device that purported to be Wing Tiek's name stamp. In para. 5 of their affidavit dated 12 January 1999, BSNC relied on the alteration as proof that Wing Tiek had sold the turbine to BSNC, obviously because the alteration meant that Wing Tiek had meant to invoice BSNC. Saship denied this, saying that Wing Tiek had intended to issue the invoice to Saship, and Saship exhibited the ACCOUNTS copy to show that Wing Tiek had not amended their copy. The controversy was resolved by a general manager of Wing Tiek's who said that he gravely doubted the genuineness of the alteration. He said that if Wing Tiek had intended to invoice BSNC, they would have issued a fresh invoice or authorised their representative to amend both the ORIGINAL and ACCOUNTS copies. As the ACCOUNTS copy had not been similarly altered by Wing Tiek, and as the general manager seriously doubted the genuineness of the amendment, I was unable to accept the ORIGINAL copy of the invoice as proof that Wing Tiek intended to invoice BSNC instead of Saship.

There was no evidence as to when, why or by whom the alteration was made. The invoice was issued on 3 January 1996, but, on the evidence available, BSNC first came into the picture six months later, when they wrote their approval letter dated 15 June 1996 to Saship. The alteration must have been made after 3 January 1996. If it were to be assumed that Wing Tiek did in fact make the alteration, one conjecture that could be made was that the alteration was made to satisfy the predisbursement condition in BSNC's letter of 15 June 1996, namely, that BSNC must receive an original invoice addressed to them. Such a conjecture would, however, worsen BSNC's case because the amendment would be additional proof of a measure to make apparent something that was not, that is, that BSNC bought the turbine and were therefore the owner of it, whereas it was Saship who had bought the turbine. BSNC could not have bought the turbine from Wing Tiek seeing that Saship had paid RM29 million for it.

As has been seen, on 3 August 1996 the agreement was signed. On 6 August 1996 BSNC paid the sum of RM20 million to Wing Tiek. Learned counsel for BSNC submitted that the payment to Wing Tiek meant that it was not a loan to Saship. I was of the view that since Saship needed the loan to pay Wing Tiek, it was no less a loan to Saship if BSNC paid the money directly to Wing Tiek. Moreover, if it was not a loan to Saship, then what was it? Learned counsel for BSNC did not suggest the answer. The answer could not be that it was the balance of the price of the turbine that BSNC bought from Wing Tiek, because it would not satisfactorily account for Saship's having paid RM29 million for the turbine.

On 8 August 1997 BSNC wrote to Saship to request permission for BSNC's security guard to be stationed at "our turbine/Victoria Two power barge". Saship's executive director approved the request by a note on the letter. In para. 12 of Saship's affidavit dated 15 February 1997, they denied acceding to the request, but I think that was merely a careless oversight of the approval that was indicated on the letter. Learned counsel for BSNC argued that the permission granted by Saship for BSNC's security guard to be stationed at the turbine or barge constituted proof that Saship acknowledged that BSNC were the owner of the turbine. To my mind, the approval was at the most an indication that Saship recognised that BSNC had an interest in the turbine, but it did not indicate that Saship recognised the interest as that of owner of the turbine.

On 14 February 1998 Saship wrote to BSNC to inform BSNC of the restraining order obtained on 4 February 1998 and to say that, in view of the order, Saship would not allow any "repossession" of the turbine. It was submitted by learned counsel for BSNC that as, in that letter, Saship used the word "repossession" and did not claim the turbine as belonging to them, the letter indicated that, to Saship, BSNC were the owner of the turbine. To my mind, the purpose of the letter was

mainly to inform BSNC of the effect of the order, not to air the controversy as to the status of the turbine, and Saship could have used the word "repossession" as describing the action that, in the eyes of BSNC, they would or might be taking upon default of payment under the agreement.

In the Schedule to an insurance policy taken out by Saship on the turbine pursuant to their obligation under the agreement, BSNC were described as the owner of the turbine and Saship as the hirer. This was cited in submission by learned counsel for BSNC as indicating that BSNC were the owner of the turbine. To my mind, the insurance policy was merely referring to the position as professed by the agreement. It was merely looking at the cloak in circumstances in which the need to look beneath it had not arisen. It was merely an extension of the agreement as it then stood, which Saship now claimed to be a cloak for a loan transaction. If Saship were entitled to show that the agreement was such a cloak, the insurance policy ought not to be used as an admission operating against them.

Having found that Saship were the owner of the turbine and that the agreement of 3 August 1996 was actually a loan agreement, I dismissed BSNC's application for repossession and granted the declarations sought by Usaha Asas.